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Since the adoption of the Rules of Civil Procedure, a favorite subject of conjecture among the members of the bar has been whether, under the liberalized procedure of the rules, the liability insurance company can be joined along with its insured as a defendant when the insured is sued in a negligence action. Such joinder has now been made, attacked by motions to dismiss and to drop a party, and sustained in the Denver District Court.[1]

The provisions of the rules most salient to this subject are found in 18 (b) and 20 (a). Rule 18 (b) provides in part, "Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action." Rule 20 (a) provides in part, "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

Without question the injured party must at some stage have a claim against the insured. This is usually created by a policy provision that the injured party shall have a right of action against the insuror *after final judgment* is obtained *against the insured.* In some jurisdictions, the right is given by the substantive law; indeed, in some jurisdictions by "direct action" statutes, the insuror may be sued as a party primarily liable. Obviously, however, the decisions from jurisdictions having "direct action" statutes, as well as decisions from those jurisdictions wherein a statutory substantive right not to be sued is given to the insuror, contribute nothing to the determination of this question in Colorado (and in most other jurisdictions) where no statutory right of or against the insuror exists.

Within the literal meaning of the rule, the claim against the insuror is "one heretofore cognizable only after another claim has been prosecuted to a conclusion." The language employed is free from ambiguity.

A principal objection to according the language its literal meaning, and the same objection which in nearly every case in the past has alone sufficed to prevent the open mention of insurance in the pleadings and during trial, is that knowledge of the jury of the existence of insurance

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[1]Reynolds vs. Epiphany, etc., No. A-41621. Decided October 15, 1945.

would create a danger of prejudice. The very efficacy of this contention practically made unnecessary and prevented the consideration of others, which until now have found exercise almost entirely in speculative discussions. But to answer this argument, it would appear highly questionable, if joinder were permissable for any affirmative reason, to deny the privilege on the excuse of danger of prejudice.

Just as in many other situations, matter objectionable on one ground may be injected, nonetheless, if admissible on another ground. Indeed, illustration may be found in this very field in the permissive questioning on *voire dire* as to the interest of veniremen in the insurance business.[2] Such being true, little difficulty should be encountered in subordinating the qualified right to protection from a mere possibility of prejudice to the clearly given right of joinder under the rules.

Other principal arguments now being raised against joinder are: (a) under the terms of the contract, the injured party has no right of action against the insuror until after final judgment obtained against the insured, (b) the insuror would be put to the trouble and expense of defending needlessly in the event that judgment was given for the insured and against the injured person, and (c) misjoinder of tort and contract actions.

In answer to the first of these contentions, it may be pointed out that the substantive liability of the parties is not affected. Just as formerly, if no judgment is obtained against the insured, no liability results to the insuror. The joinder merely accomplishes in one proceeding that which formerly required two. The rule itself furnishes protection against transgression of substantive rights, contract or otherwise, by its provision that "the court shall grant relief only in accordance with the relative substantive rights of the parties."

The argument based upon needless expense and trouble to the insuror will in nearly every case be found to be non-existent since, under the policy terms, the insuror will be defending the action on behalf of the insured, and usually with its own attorneys.

Aside from this, when a choice becomes necessary between consolidation and expedition on the one hand, and conservative procedural safeguards on the other, the preference of the rules for the former is never in doubt. Can the insurance company assert that its risk of making a needless defense is any more than the grantee's in the situation alluded to by rule 18 (b), namely, "A plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained judgment establishing the claim for money"? Or can it claim that it is more subject to the risk than is the third party defendant,

[2]Rains vs. Rains, 97 Colo. 19, *inter alia.*

joined under rule 14, whose liability will not arise unless and until the primary defendant's liability to the plaintiff is established? It would seem very doubtful.

The misjoinder of actions contention finds its answer in rules 20 (a) and 18 (a) so plainly as to require no elaboration.

In the Denver District Court case alluded to above, plaintiff was required to meet the contention, strenuously urged, that the policy, which created plaintiff's right against the insuror, also prohibited the joinder which plaintiff sought to make. These provisions, more or less standard, read as follows: "No action shall lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company," and, "Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against Insured to determine the Insured's liability." The essence of this argument was that if the injured party had any right against the insured, it was created by and derived from the policy and therefore subject to, and governed by, the above provisions found in the same instrument.

In reply to this argument it was pointed out that efforts to contract against the processes of the law must fail.[3] While one may waive his own rights in certain instances, one may not by contract deprive the courts of their right to employ their duly adopted procedure for the determination of a liability. In short, one cannot at will contract away the Rules of Civil Procedure.

Ultimate determination of the question, of course, remains for the Colorado Supreme Court. So far as the reported decisions, both state and federal, reveal, the decision by the Denver District Court may well be the first in the country of this precise question.

[3]Walters vs. Eagle Indemnity, 61 S. W. (2d) 666; The Thomas P. Beal, 298 Fed. 121; Otis Co. vs. Maryland Cos. Co., 95 Colo. 99.